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Becky Kreag

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Transferring Conserved Water:
the Oregon Experience

Becky Kreag

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**Moving the West's Water to New Uses:
Winners and Losers**

**Natural Resources Law Center
University of Colorado School of Law
June 6-8, 1990**

I. Introduction

A. Summary

In 1987, the Oregon Legislature passed Senate Bill 24 which created a process for allocating conserved water to other uses. The legislation attempted to provide an incentive to construct conservation measures. A broad range of interests including agricultural and environmental organizations were involved in drafting and securing passage of the bill. Since passage, the Department has received only one application for allocation of conserved water. The major deterrent to use of the new law is the requirement that only "irretrievably lost" water that is conserved, qualifies for transfer to additional use. The purpose in using the strict "irretrievably lost" standard was to avoid potential harm to other users. The value of the water to be conserved may not be high enough to compensate for the costs of many conservation measures.

B. General References

Chapter 264, Oregon Laws 1987 (Senate Bill 24). Codified as ORS 537.455 to 537.500 and 540.510.

Oregon Administrative Rules (OAR) 690-18-010 to 090.

II. The Setting

A. Increasing demands for water and protection of instream flows

1. Pacific Northwest Electric Power and Conservation Planning Act (1981) placed a new focus on restoration of Columbia River basin salmon runs.
2. Interest in and need for additional recreational opportunities for urbanizing population is reflected in changes to the state minimum streamflow program and creation of many new state scenic waterways.
3. Pressure for reallocation of water stems from the transition from an agricultural to a service economy. The major emphasis is for transfer from out-of-stream to instream use.

B. Menucha Conference

1. A retreat involving legislators on the Joint Water Policy Committee, Water Resources Commissioners, agency administrators, and interest groups was held during August 1986.
2. Subcommittees were appointed at the Menucha Conference to follow up with legislation. This resulted in introduction of three bills during the 1987 legislative session.
 - a. Senate Bill 23 created the Governor's Watershed Enhancement Board to fund riparian area

improvement projects and to encourage protection and restoration of riparian area resources.

- b. Senate Bill 24 allowed allocation of conserved water to instream and out-of-stream uses.
- c. Senate Bill 140 created instream water rights, allowed the Departments of Environmental Quality, Fish and Wildlife, and Parks and Recreation to apply for new rights, and provided for the transfer to instream uses of out-of-stream rights.

III. Senate Bill 24

A. Purpose was to provide incentive to conserve

- 1. Under the prior appropriation doctrine, water users had limited opportunity to benefit from efficiency improvements.
- 2. Common perception is that part of a water right is jeopardized by implementation of efficiency measures because of the abandonment provisions in Oregon law.
- 3. Senate Bill (SB) 24 allows a water user implementing conservation measures to benefit from the water which would be conserved.
- 4. Water users would be able to apply saved water to new uses, to sell or lease the water to another party, or to

reserve the water instream for future out of stream use or to dedicate the water to instream uses permanently.

5. Instream uses are provided for by allocating a portion of the conserved water to the state to be managed as stored water.

B. Provisions of bill

1. Water users can benefit from implementation of a water conservation measure by using the owner's portion of the water on additional lands or for new uses, or by selling or leasing the conserved water.
2. The allocation of water between the water user and the state is 75 percent to the user and 25 percent to the state unless the Water Resources Commission determines that another ratio is more appropriate.
3. The water rights for the conserved water are given a priority of one minute after that of the original right.
4. The process for selling, leasing or reserving instream the conserved water right provides a broad range of opportunities for the water right holder to obtain maximum benefit from the right.
5. Conserved water is defined as the amount of water, previously unavailable to subsequent appropriators, that results from conservation measures and cannot be allocated if doing so would harm another appropriator.

- a. The legislature was concerned about the effects on return flows of conservation measures.
- b. The legislative committee discussed limiting conserved water to the reduction in the amount of water consumed.

C. Issues during drafting of Administrative Rules.

- 1. Measurement of water historically used.
 - a. A concern was that water use information in the application could constitute evidence of a partial abandonment of the right if historical use was less than the full water right.
 - b. Rules require information on water use during four of the last five years because five consecutive years is the basis for forfeiture.
- 2. Identifying the amount of water conserved.
 - a. A concern was that the amount of water conserved could not be accurately predicted prior to project implementation. A water user then could not predict the economic benefit of the proposed conservation project.
 - b. A two-step process was created. The Department sets the percentage allocation of the conserved water to the user before implementation of the project. The amount of water actually conserved

is determined and water rights issued after implementation of the project and after a period of measurement.

3. Determining quantity of water previously unavailable to subsequent appropriators and assuring that other users would not be harmed.

- a. The effect of a reduction in return flows on other, downstream appropriators continued to be a concern.
- b. Law limits conservation to a reduction in the amount of water consumed or irretrievably lost in the process of satisfying an existing beneficial use. The rules do not further define either "water consumption" or "irretrievably lost." The advisory committee recommended this approach to give the Department the broadest leeway in determining the quantity conserved.
- c. The law was amended in 1989 to permit mitigation where harm to another water right was expected.

4. Complexity of the application process.

- a. The rule advisory committee was concerned that the two-step process for allocating and documenting the conserved water was too complex and time consuming. The process would

dampen the incentive and limit the number of applications. Options such as awarding the conserved water immediately were considered but did not seem advisable.

- b. The Commission expressed an intent to review the rules after some applications had been processed to identify changes which would better encourage conservation measures.

IV. Implementing SB 24 and the Administrative Rules

A. Promoting the Law

1. The Department prepared an information brochure on the law. It has been distributed to irrigation districts and through watermaster offices and at public meetings.
2. The Department is working with the Bureau of Reclamation and irrigation districts in the Deschutes and Hood River basins to identify potential conservation projects.

B. Mt. Hood Irrigation District.

1. The Mt. Hood Irrigation District has submitted the only application the Department has received to date on June 28, 1989.
2. The conservation project in the application was started after law passed, but before filing an application.

3. The project involves converting from open, unlined canals to a 44,320 foot buried, pressurized, piped delivery system. Two diversion structures will also be rebuilt. The district does not propose any changes to the on-farm irrigation system.

4. Project analysis

- a. The amount of water historically used by the district exceeded its water rights by nearly 60 percent. The district did not include any of that excess as part of the "conserved water."
- b. The conservation project will allow the district to meet needs within its water right, but water needs are predicted to equal the water right in July and August and only achieve the savings in the other months.
- c. The district is located in a narrow alluvial valley and reductions in diversions are expected to result in similar reductions in return flows. It is therefore difficult to find that the conserved water would represent waters which were irretrievably lost during previous irrigation practices. Since no on-farm changes are proposed, it is unlikely that there would be a significant reduction in water consumption.

- d. Downstream users, including an instream water right, may be harmed if the district is allowed to increase consumption during the month of greatest demand by irrigating additional lands throughout the season. Downstream rights include 4.6 cfs for irrigation of 371 acres, hydroelectric power projects, and an instream water right from 100 to 150 cfs. The Department analyzed the potential harm to these uses if additional water consumption was allowed. The Department found that water is generally available for all uses from the beginning of the irrigation season through June 15. The potential for harm is high after June 15.

V. Problems with Program

A. Lack of Water Use Records

1. The process of applying for water conservation project benefits require the user to determine recent water use.
2. Until 1985, the state had given little attention to the measurement of actual water use. Laws in 1985 (SB 288) and 1987 (SB 142) began to focus attention on the need for current ownership and water use information. As of 1989, public entities are required to report water use annually.

3. Private water users seldom measure water diversions or application rates for irrigation. Estimating four years of use would be difficult.

B. Difficulty in Documenting Water Consumption

1. Oregon State University has produced good regional guidelines for irrigation crop requirements. These guidelines are based on fixed assumptions of evaporation and transpiration losses. It is more difficult to find references for predicting differences in evaporation and transpiration based on irrigation systems.
2. Accurate assessment of water consumption requires knowledge of the entire irrigation or water use system, the amount diverted, the return flow, the climate, and the vegetation receiving water (crop and non-crop).

C. Little Water is Irretrievably Lost

1. Although "irretrievably lost" was not defined in the law, it was assumed to include waters lost through evaporation, percolation to deep aquifers and movement across basin boundaries.
2. Clear opportunities to find water that is "irretrievably lost" exist when water is transported across basin or major subbasin boundaries. Water savings that occur in the receiving basin were previously lost to the supplying basin.

3. Sponsors of the law hoped that including "irretrievably lost" water in the definition of conserved water would broaden opportunities to apply the law. However, much of Oregon's agricultural land is located in alluvial river valleys. Water that percolates to ground water is generally in a shallow aquifer that discharges back to the stream in a short period of time.

D. Water Right Holders Are Uncertain About the Effects of the Program

1. Many in agriculture have expressed concern that reductions in the water right that make sense for one crop will limit flexibility to turn to a higher water using crop in the future. Loss of flexibility is perceived as a disincentive.
2. Many farmers have expressed a general distrust of creating instream rights, even with strong measures to prevent injury to other users.
3. The agricultural community is also concerned that greater knowledge of water use will lead to more regulation and less flexibility in the future. Parts of water rights may be cancelled. In several areas, water use is now known to exceed water right limitations. Credit is not likely to be earned for conservation that reduces use down to the legal limits. Water management efforts in Oregon are likely to begin

focusing on enforcement of current water right limitations regardless of SB 24.

E. Uncertainty in Determining the Value of Conserved Water

1. The allocation of a water right for conserved water will not occur for several years following completion of a conservation project. Projects may require outside sponsors because the sale or use of conserved water does not provide immediate financing for the conservation measure.
2. Many farm operations are economically marginal or heavily indebted. The initial financing will be difficult even if the owner desires to carry out a project.

VI. Future of the Oregon Water Conservation Law

A. Opportunities for Additional Proposals

1. While response to the program has been limited, we believe there still may be situations in which allocation of conserved water to new lands or uses will provide an incentive.
2. In the Deschutes Basin, we believe that return flows come back to the river near two major reservoirs which will dampen any possible effects of conservation. Another factor which leads us to believe that conserved water could be allocated is the large quantity of water in the river downstream of the reservoirs.

3. There also may be opportunities to allocate water in other areas where storage water represents a major component of streamflows.

B. Legislative Proposals

1. Legislative discussions are underway for the 1991 session. One idea is to simplify the process by focusing the definition of conserved water on reduction in the amount of water diverted. Tossing out "water consumption" and "water that is irretrievably lost" as the basis of conservation may frequently threaten to harm other users, but would provide greater incentive for the water right holder and greater ease of administration.
 2. A second change to go along with reliance on reductions in diversion would be a fixed split of 50 percent of conserved water to instream use and 50 percent to the water right holder.
 3. Both recommendations are likely to meet with opposition. The state is more likely to increase technical and financial support for a general statewide conservation program than make major changes in SB
- 24.

CHAPTER 264**AN ACT**

SB 24

Relating to water; creating new provisions; and amending
ORS 540.510.

Be It Enacted by the People of the State of Oregon:

SECTION 1. As used in ORS 540.510 and sections 1 to 10 of this Act:

(1) "Conservation" means the reduction of the amount of water consumed or irretrievably lost in the process of satisfying an existing beneficial use achieved either by improving the technology or method for diverting, transporting, applying or recovering the water or by implementing other approved conservation measures.

(2) "Conserved water" means that amount of water, previously unavailable to subsequent appropriators, that results from conservation measures.

(3) "In stream" means within the natural stream channel or lake bed or place where water naturally flows or occurs.

(4) "Managed as stored water" means to protect water from diversion until the water has served its intended purpose.

(5) "Public use" includes but is not limited to:

- (a) Recreation;
- (b) Protection and enhancement of fish life, wildlife, fish and wildlife habitat and any other ecological values;
- (c) Pollution abatement;
- (d) Navigation;
- (e) Scenic attraction; or
- (f) Any other similar or related use or use protected by the public trust.

SECTION 2. (1) The Legislative Assembly finds and declares that conservation and efficient utilization of water benefits all water users, provides water to satisfy current and future needs through reduction of consumptive waste, improves water quality by reducing contaminated return flow, prevents erosion and allows increased in-stream flow; and

(2) It is therefore declared to be the policy of the State of Oregon to:

- (a) Aggressively promote conservation; and
- (b) Encourage the highest and best use of water by allowing the sale or lease of the right to the use of conserved water.

(3) As used in this section, "efficient utilization" means use without waste, upgrading of irrigation equipment to comply with modern practices within a reasonable time period or other methods used to meet both current and future water needs at the least cost.

SECTION 3. (1) Any person holding a water right certificate issued under ORS 537.250, 537.630 or 539.140 may submit a conservation proposal to the Water Resources Commission for approval.

(2) A conservation proposal submitted under subsection (1) of this section shall include:

- (a) A description of the conservation measures the person proposes to implement;
- (b) A statement of the amount of water the holder of the water right is currently using beneficially each year;
- (c) The amount of conserved water the holder expects to result from implementation of the conservation measures; and

(d) Any other information the commission considers necessary to evaluate the effectiveness of the proposal.

(3) If a person proposes conservation measures within the boundaries of an irrigation district organized under ORS chapter 545 or a water control district organized under ORS chapter 553, at the time the person submits the proposal, the person also must submit evidence that the district has approved the conservation proposal.

SECTION 4. (1) Upon receipt of a conservation proposal under section 3 of this Act, the Water Resources Commission shall review the proposal and allocate conserved water according to subsections (2) and (3) of this section and the rules and standards adopted by the commission under section 6 of this Act.

(2) The commission shall allocate conserved water if the commission finds that the proposed conservation measure:

- (a) Is feasible;
- (b) Will produce conserved water;
- (c) Can be effected without injury to existing water rights; and
- (d) Will not adversely affect the public interest.

(3) In allocating conserved water, the commission shall allocate 25 percent of the conserved water to the state, unless the commission finds that more or less water should be allocated to the state under the criteria established by rule by the commission pursuant to section 6 of this Act.

(4) The commission shall notify the applicant of its action under subsections (2) and (3) of this section. An applicant may request a hearing before the commission according to provisions of ORS 183.310 to 183.550 applicable to review of a final order.

SECTION 5. (1) Upon completion of the conservation measures proposed under section 3 of this Act, the water right holder shall request the Water Resources Commission to determine the quantity of conserved water allocated to the state and to the water right holder according to the percentages established by the commission under section 4 of this Act.

(2) Any person requesting the commission to allocate a quantity of conserved water under subsection (1) of this section must demonstrate:

- (a) The amount of water consumed beneficially by the water right holder before implementation of the conservation measures;
- (b) The amount of water the water right holder now requires for the same beneficial use after implementation of the conservation measures;
- (c) The use the holder intends to put the portion of conserved water to which the holder is allocated; and
- (d) That the use of the conserved water by the holder would not harm any other appropriator.

(3) After the commission completes the allocation of conserved water under subsection (1) of this section, the commission shall issue new certificates covering the

changes in the original water right. A separate new certificate preserving the previously established priority of rights shall be issued to cover the unaffected portion of the water right and a separate new certificate indicating the priority of rights as set forth in section 7 of this Act shall be issued to cover the right to the use of the conserved water.

SECTION 6. The Water Resources Commission shall adopt rules and standards necessary to carry out the provisions of sections 1 to 10 of this Act. The rules shall include at least the following:

(1) A procedure for managing the state's portion of conserved water as stored water.

(2) Criteria the commission shall consider in allocating more or less than 25 percent of conserved water to the state. Such criteria shall include, but need not be limited to:

- (a) The source of funds used for implementing the conservation measure;
- (b) The amount of conserved water to be managed as stored water as necessary to satisfy identified in-stream needs as determined by the commission;
- (c) Whether or not the water right is located in a critical ground water area; and
- (d) Any pertinent provisions of the applicable basin plan.

(3) Criteria for determining how the state manages the portion of conserved water allocated to the state.

(4) Criteria for determining the stream reach within which conserved water must be managed as stored water.

(5) The procedure for allocating percentages of conserved water under section 4 of this Act.

(6) The procedure for determining quantities of conserved water under section 5 of this Act.

SECTION 7. Notwithstanding any other provision of ORS chapter 536, 537, 538, 539, 540, 541, 542 or 543, the priority of any right to the use of conserved water under a proposal submitted and approved by the Water Resources Commission under sections 3 and 4 of this Act shall be one minute after the priority of the water right held by the person implementing the conservation measures.

SECTION 8. (1) Any person or agency allocated conserved water under section 5 of this Act may reserve the water in stream for future out-of-stream use or otherwise use or dispose of the conserved water. Any person or agency to whom conserved water is allocated shall notify the commission of the dispensation of the right to the use of conserved water. The notice shall include:

(a) The name and address of the person buying or leasing the right to the use of conserved water;

(b) The use to which the conserved water is to be put; and

(c) The terms of any agreement between the appropriator and the person using the conserved water.

(2) Notwithstanding any other provision of law, a person who holds a water right permit or certificate having a subsequent priority to a certificate issued under section 5 of this Act may not acquire a vested right to any water or return flow of water that results from either the lease of the right to the use of conserved water or the reservation of conserved water in stream for future use under subsection (1) of this section.

(3) Any right to the use of conserved water sold under subsection (1) of this section:

(a) Shall become appurtenant to the premises upon which the purchaser uses the water; and

(b) Shall be subject to the provisions of ORS 540.510 to 540.530 and 540.610 to 540.650.

(4) When the commission receives notice of the sale of the right to the use of conserved water under subsection (1) of this section, the commission shall issue to the purchaser a new water right certificate covering the right to the use of conserved water that was sold. The certificate shall indicate the priority of the water right according to the provisions of section 7 of this Act.

SECTION 9. Any agency or political subdivision of this state may purchase a right to the use of conserved water, as defined under section 1 of this Act, or accept a gift of a right to the use of conserved water as defined under section 1 of this Act. If an agency or political subdivision requests that the conserved water remain in the stream, the commission shall manage the conserved water in a manner that results in the conserved water remaining in the stream.

SECTION 10. (1) A water right for conserved water under this Act shall have the same legal status as any other water right for which a certificate has been issued.

(2) A water right for conserved water that is reserved in stream for future out-of-stream use under section 8 of this Act or that the commission manages under section 9 of this Act is not subject to cancellation under ORS 537.260 or 537.410 to 537.450 or to abandonment under ORS 540.610 to 540.650.

SECTION 11. ORS 540.510 is amended to read:

540.510. (1) **Except as provided in subsection (2) of this section,** all water used in this state for any purpose shall remain appurtenant to the premises upon which it is used and no change in use or place of use of any water for any purpose may be made without compliance with the provisions of ORS 540.520 and 540.530. However, the owner of any water right may, upon compliance with the provisions of ORS 540.520 and 540.530, change the use and place of use, the point of diversion or the use theretofore made of the water in all cases without losing priority of the right theretofore established.

(2) **Subject to the limitations in section 8 of this 1987 Act, any right to the use of conserved water allocated by the Water Resources Commission under section 5 of this 1987 Act may be severed**

from the land and transferred or sold after notice to the commission as required under section 8 of this 1987 Act.

(3) **The sale or lease of the right to the use of conserved water under section 8 of this 1987 Act does not constitute a change of use or a change in the place of use of water for purposes of ORS 540.520.**

Approved by the Governor June 9, 1987

Filed in the office of Secretary of State June 10, 1987

CHAPTER 265

AN ACT

SB 104

Relating to the Highway Division; amending ORS 366.165; repealing section 160, chapter 158, Oregon Laws 1987 (Enrolled House Bill 2409); and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORS 366.165 is amended to read:

366.165. (1) The revolving fund in the amount of ~~[\$750,000]~~ **\$400,000** established by warrant drawn on any fund belonging to the state highway funds in favor of the State Highway Engineer is continued.

(2) The revolving fund shall be deposited with the State Treasurer. The fund shall be at the disposal of the highway engineer. **The highway engineer may designate persons authorized to pay claims from the fund and shall specify the maximum amount of money each designee may draw from the fund. The fund may be used [and may be used by the highway engineer]:**

(a) To pay salaries, travel expenses, compensation or payments for real property purchased or otherwise acquired, and emergency claims; or

(b) To secure or take advantage of trade discounts **and to pay for services, materials and capital outlay.**

(3) All vouchers for claims paid from the fund shall be approved by the highway engineer and audited by the fiscal officer of the department. When claims are so approved and audited, warrants covering them shall be drawn in favor of the highway engineer and shall be used by the highway engineer to reimburse the fund.

SECTION 2. If House Bill 2409 becomes law, section 160, chapter 158, Oregon Laws 1987 (Enrolled House Bill 2409), is repealed.

SECTION 3. This Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this Act takes effect on its passage.

Approved by the Governor June 9, 1987

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OREGON ADMINISTRATIVE RULES
WATER RESOURCES DEPARTMENT
CHAPTER 690, DIVISION 18
CONSERVATION AND THE USE OF CONSERVED WATER

2/90

PURPOSE
690-18-010

The purpose of OAR 690-18-010 through OAR 690-18-090 is to carry out the provisions required by the enactment of ORS 537.455 to 537.500 and 540.510 (2) and (3), the intention of which is to promote the conservation of water, maximize beneficial use and enhance streamflows.

DEFINITIONS
690-18-020

The following definitions apply in OAR 690 Division 18 and to any proposals approved or certificates issued under these rules.

- (1) "Commission" means Water Resources Commission.
- (2) "Conservation," as defined in ORS 537.455, means the reduction in the amount of water consumed or irretrievably lost in the process of satisfying an existing beneficial use, achieved either by improving the technology or method for diverting, transporting, applying or recovering the water, or by implementing other approved conservation measures.
- (3) "Conserved Water," as defined in ORS 537.455, means the amount of water, previously unavailable to subsequent appropriators, that results from conservation measures.
- (4) "Conserved water right" means a water right established by allocation of a quantity of water, which results from the savings created by the implementation of a conservation measure, approved by the Water Resources Commission.
- (5) "Department" means Water Resources Department.
- (6) "Director" means Water Resources Director.
- (7) "Feasible" means a conservation proposal incorporating appropriate technology or improved use or management of water which would result in a reduced diversion.
- (8) "Instream," as defined in ORS 537.455, means within the natural stream channel or lake bed or place where water naturally flows or occurs.
- (9) "Instream water right," as defined in ORS 537.332, means a water right held in trust by the Water Resources Department for the benefit of the people of the State of Oregon to maintain water instream for public use. An instream water right does not require a diversion or any other means of physical control over the water.

(10) "Public use," as defined in ORS 537.455, includes, but is not limited to:

- (a) Recreation;
- (b) Protection and enhancement of fish life, wildlife, fish and wildlife habitat and any other ecological values;
- (c) Pollution abatement;
- (d) Navigation;
- (e) Scenic attraction; or
- (f) Any other similar or related use or use protected by the public trust.

POLICY

690-18-030

- 1) The implementation of ORS 537.455 to 537.500 and 537.540 (2) and (3) is a means of promoting more efficient use of water while increasing streamflows where public benefits can be enhanced. These rules are intended to encourage the highest and best use of water by allowing the sale or lease of the right to the use of conserved water.
- 2) An analysis of past water use is necessary to evaluate the effectiveness of a conservation measure. A lack of detailed use records will not automatically delay the processing of a conservation application, but the Commission may require a period of data collection by the applicant prior to implementation to establish a baseline for evaluating the effectiveness of the measures.
- 3) The Commission recognizes that the potential to conserve water and the benefits from water conservation may vary with each proposal. These rules establish a process to review and evaluate the merits and impacts of conservation proposals. After a sufficient number of applications are submitted, these rules shall be reviewed and revised, if necessary, to further promote efficient water use.
- 4) It is the intent of these rules to maintain and protect the irrigated agricultural base by allowing conserved irrigation water to be used to meet the needs of the right holder.

APPLICATION FORM

690-18-040

- (1) Each application containing a conservation proposal shall be prepared on forms provided by the Department. A separate conservation application must be submitted to the Department for each water right, except:
 - (a) When the conservation application is submitted by an organized water distribution entity, such as an irrigation district or other

user group. Evidence of the applicant's authority to represent the certificate holders must be included.

- (b) When a conservation application is submitted for several rights under one ownership.

(2) Applications shall contain:

- (a) The applicant's name, mailing address and telephone number;
- (b) The names appearing on the certificates, decrees, or proof of appropriation;
- (c) The names of decrees and page numbers, if applicable.
- (d) The permit and certificate numbers, if applicable;
- (e) The source(s) of water;
- (f) The dates(s) of priority;
- (g) The rate and total volume of water diverted in four of the last five years, and the rate and volume used in the portion of the system to be affected, noting the means of determination;
- (h) The amount of conserved water the applicant expects to result from the implementation of the conservation measures in each month of the use period, described as a rate of flow and volume of water;
- (i) A preliminary schedule which includes when the applicant proposes to begin construction, complete construction, and expects to achieve conservation;
- (j) The estimated cost of the project, the anticipated source of funds and amounts from each source;
- (k) For any out of stream use, the point of diversion, place of use and the type of use the holder intends to make with the portion of conserved water the holder may be allocated. If the use is instream, the applicant must specify the stream reach for which the water is to be managed.
- (l) Whether the anticipated use of conserved water is on the applicants property, a sale, a lease, a temporary reservation or a dedication.
- (m) A list of public and private entities which may have an interest or regulatory authority concerning any aspect of the proposed conservation measure;
- (n) Irrigation district or water control district approval when applicable;
- (o) Other information the Department or Commission deems necessary and appropriate to aid in the evaluation of the proposal.

(3) Items to be attached to the application are:

- (a) A map with sufficient detail to locate and describe the facilities or areas affected by the conservation measures.
- (b) A narrative description of the conservation proposal, including:
 - (A) A description of the diversion, transportation, application or recovery system which will be affected. The description shall be sufficient to verify the listed rates and volumes;
 - (B) A description of what presently happens to the water the applicant is proposing to conserve;

- (C) A description of the planned changes necessary to conserve water. The description must be of sufficient detail to calculate new rates of use;
- (D) A description of any measures planned to protect the public interest;
- (E) An assessment of the possible effects the proposed use of conserved water will have on other appropriators.
- (F) A description of any mitigation planned to offset anticipated impacts to other water users.

PROCESSING A CONSERVATION APPLICATION
690-18-050

- (1) When the Department receives a conservation application the Director shall make the following evaluation:
 - (a) Whether the conservation proposal will result in a reduced diversion.
 - (b) Whether the conservation proposal will not adversely affect existing water rights or the public interest, as described in ORS 537.170 (5); and,
 - (c) Whether 25 percent of conserved water is the appropriate amount to allocate to public use. The criteria the Director shall use in making a recommendation concerning the allocation of conserved water are listed in OAR 690-18-050 (6)(b)(A)(i) through (vi).
- (2) The Director shall provide public notice of all conservation applications and preliminary evaluations through:
 - (a) Publication in a newspaper having general circulation in the area in which the water rights addressed in the proposal are located, for a period of at least three weeks and not less than one publication each week; and,
 - (b) Mailing notification to individuals, organizations and agencies on the OAR Chapter 690 Division 1, and Division 11 mailing lists, to any person who has requested notification of proposals and any one else the Director determines should be notified.
- (3) If an objection is received by the Department within 30 days of the mailing of public notice or the first publication under (2)(a) above, the Director may work with the applicant and any person or agency raising the objection to determine whether the issues can be resolved through mutually agreeable conditions, or by modifications of the proposal.
- (4) The Director shall refer the application, all public responses and an evaluation to the Commission.
- (5) The Commission shall examine the application, the public responses and the Director's evaluation. If in the judgement of the Commission a

proposed conservation measure may injure existing water rights or adversely affect the public interest, the Commission shall hold a public hearing on the application pursuant to ORS 537.170.

- (6) (a) The Commission shall allocate conserved water if the Commission finds that the proposed conservation measure:
- (A) Is feasible; and,
 - (B) Will produce conserved water; and,
 - (C) Can be effected without injury to existing water rights;
 - (D) Adequately mitigates any effects on other water users; and
 - (E) Will not adversely affect the public interest.
- (b) When the Commission allocates conserved water it shall issue a proposed order to be served on the applicant. A copy of the order shall be furnished to any one requesting a copy. The order shall include:
- (A) The percent of water allocated to the applicant and the state. The criteria the Commission shall consider in allocating more or less than 25 percent of conserved water to the state shall include, but need not be limited to:
 - (i) The amount of water necessary to satisfy identified instream needs as determined by the Commission;
 - (ii) The source of funds used for implementing the conservation measure. When more than 25 percent of the funds used to finance the project come from public sources and there are identified instream needs, more than 25 percent of the conserved water should be allocated to the State, except when allocating less would be of sufficient benefit to offset the contribution of the public funds;
 - (iii) The conservation potential of the affected basin. Less than 25 percent may be allocated to the State when the Commission determines that a lower allocation may result in an increase in conservation effort in the basin;
 - (iv) Whether or not the water right is located in a critical groundwater area. When in a critical groundwater area the Commission may allocate less than 25 percent to the State if the water right source is surface water and the applicant is willing to accept a condition on the use of conserved water such that its use may protect or enhance the groundwater aquifer;
 - (v) Whether or not the water right is located in an area with unresolved Native American or Aboriginal water rights. If so, more may be allocated to the State to offset potential future claims on the waters of Oregon;
 - (vi) The pertinent provisions of the applicable basin plan.
 - (B) Any conditions placed on the proposed conservation measure, including a designated method and schedule for the collection

of data before and after implementation to determine the effectiveness of the measures; and,

(C) The approved schedule for:

- (i) Completion of construction; and,
- (ii) Implementation of the conservation measure; and,
- (iii) A time limit for requesting allocation of a quantity of conserved water. The applicant may request an extension of time if the project is not completed on schedule.

(c) If a timely request for a hearing is not filed under OAR 690-18-060, the director shall issue a final order.

(7) The issuance of a final order allocating a percent of conserved water does not allow any change in the type of use, place of use, or point of diversion of the original water right.

APPEAL
690-18-060

An applicant or any one objecting to the proposed order may request a contested case hearing before the Commission within 30 days of issuance of the proposed order.

ALLOCATION OF A QUANTITY OF CONSERVED WATER
690-18-070

(1) Upon completion of the approved conservation measures, and the designated period of measurement, the water right holder may request the Water Resources Commission to determine the quantity of conserved water allocated to the state and to the water right holder according to the percentages established by the Commission. Any person requesting an allocation of (a quantity of) conserved water, must calculate on a form provided by the Department, the amount of conserved water by subtracting (b) from (a) as provided below.

(a) The maximum rate of diversion, and total volume appropriated as determined by measurements during the use period prior to the implementation of the conservation measures designated in OAR 690-18-050 (6) (b) (B).

(b) The maximum rate of diversion and total volume appropriated as determined by measurements during the use period following the implementation of the conservation measures as designated in OAR 690-18-050 (6) (b) (B). The Department may assist the applicant in making measurements to determine maximum rate of diversion and total volume appropriated as determined by measurements during the designated period.

(2) Due to weather factors, the applicant may request, or the Commission

may determine, that a different quantity of conserved water than the amount shown above shall be considered as the amount of conserved water when applying the percentages defined in the final order under OAR 690-18-050 (6) (b) (A).

- (3) The request for allocation of a quantity of conserved water shall include:

- (a) The point of diversion, place of use and the type of use the holder intends to make with the conserved water right. The information shall include:

- (A) The name and address of any person buying or leasing the conserved water right and a legal description of the place of use.
- (B) The period of time for which a water right is to be reserved instream, when applicable.
- (C) A map shall be submitted that will clearly show each of the following:

- (i) The location of each diversion point, by reference to a recognized public land survey corner. The locations may be shown by distance and bearing or by coordinates (distance north or south and distance east or west from the corner).
- (ii) If the use is irrigation, the area to be irrigated in each quarter-quarter section shall be indicated by shading or hachuring and the number of acres in each quarter-quarter section indicated.
- (iii) If the right is to remain instream, the stream reach through which the water is to be managed.
- (iv) The scale to which the map is drawn, the section number, township, and range, and a north directional symbol.

- (D) The terms of any agreement between the appropriator and the person using the conserved water.
- (E) If the right to the use of the conserved water is leased, a place where the water is to revert to upon expiration of the lease, containing the same information requested in OAR 690-18-070 (3) (a) through (b).

- (b) Evidence that the use of the conserved water by the holder would not harm any other appropriator.

- (4) The Commission shall verify the information provided in the request for allocation, submitted to satisfy OAR 690-18-070 (1) through (3), and allocate a quantity of water to the applicant and the state based on the percentages established under OAR 690-18-050 (6). After the Commission completes the allocation of conserved water, the Commission shall issue new certificates covering the changes in the original water right. These shall be:

- (a) A separate new certificate preserving the unaffected portion of

the water right.

- (b) A separate new certificate shall be issued to define the right to the use of the applicant's portion of conserved water.

- (A) When the right is not leased, reserved instream or dedicated to instream use, the certificate shall include:

- (i) The name and address of the water right holder;
- (ii) The decree and page number or the certificate number of the original water right;
- (iii) The location of the point of diversion;
- (iv) The source of water;
- (v) The priority date of the right;
- (vi) The rate at which water may be diverted and the amount that may be diverted;
- (vii) The purpose for which the water is used.
- (viii) The description of the legal subdivisions of land to which the water is appurtenant.
- (ix) Any terms or conditions from the original water right which still apply;
- (x) Any other special circumstances or limitations affecting the use of water.

- (B) When the conserved water right is leased by the water right holder, a certificate shall be issued:

- (i) Subject to the terms and conditions of the lease.
- (ii) Containing the same information listed in (i) through (x) above.
- (iii) Describing the place of use the right will revert to upon the expiration of the lease.

- (C) When the conserved water right is reserved instream for future out of stream use, a certificate shall be issued which states:

- (i) The name and address of the water right holder;
- (ii) The decree and page number or the certificate number of the original water right;
- (iii) The source of water;
- (iv) The priority date of the right;
- (v) The rate and duty which will be managed instream;
- (vi) The stream reach through which the conserved water will be managed;
- (vii) Any terms or conditions from the original water right which still apply.
- (viii) Any other special circumstances or limitations affecting the use of water.

- (c) When a conserved water right is dedicated to instream use a new certificate shall be issued (defining the same information described in

- (C), (i) through (viii) above) according to (d) below.
- (d) A new certificate shall be issued to the Water Resources Department defining the state's portion of the conserved water. This shall include:
- (A) The decree and page number or the certificate number of the original water right;
 - (B) The source of water;
 - (C) The priority date of the right;
 - (D) The use for which the water will be managed;
 - (E) The stream reach within which the water will be managed;
 - (F) The rate of flow allocated to the state;
 - (G) The dates within which this right will be managed;
 - (H) All applicable terms or conditions from the original water right;
 - (I) Any special circumstances or limitations affecting the use or management of water.

MANAGEMENT OF CONSERVED WATER
690-18-080

- (1) The Department shall manage any conserved water allocated to instream use under the rules established to implement ORS 537.332 to 537.360 pertaining to instream water rights.
- (2) A conserved water right reserved instream for future out of stream use shall be managed to carry the water through the stream reach approved by the Commission. Any conserved water reserved instream shall maintain its priority date and will not be subject to abandonment under ORS 540.610 to 540.650.

CHANGE IN USE OF CONSERVED WATER
690-18-090

- (1) Any person or agency holding a certificate for the use of conserved water, which is being leased or reserved instream for future out of stream use, shall notify the Director of any change in the type of use, place of use or point of diversion. The notice must be submitted 60 days before the actual change and must include the same information requested in OAR 690-18-070, part (3)(a) and (b). All other water rights are subject to the transfer rules in OAR 690, Division 15.
- (2) The Director shall only approve a change in the use of conserved water, that involves a change in the point of diversion, when the proposed change could not constitute an expansion of the right.
- (3) A change in the dispensation of the use of a conserved water right shall be deemed approved if the Director takes no action within 60 days.
- (4) Any right to the use of conserved water that is sold or given to an

agency or political subdivision of the state or person:

- (a) Shall become appurtenant to the premises upon which use is made; and,
 - (b) Unless dedicated to instream use, shall be subject to the provisions of ORS 540.510 to 540.539 and 540.610 to 540.560.
- (5) The Director shall issue an order amending the certificate for the right to the use of conserved water, which describes the new use of the conserved water. The order shall include the information cited in OAR 690-18-070 (4) (b) or (c).